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ABSTRACT

The foundations of the public's right to know what the government is doing and the limitations placed on that right are explored in this paper. The role of the press in furthering the people's right to know is also discussed. Sections in the paper deal with the following topics: (1) general and historical thought on the right to know: (2) the foundation of the right to know: (3) limitations on the right to know and the role of the press: (4) balancing public interests and government legislation: (5) the right of privacy and the right to know: and (6) implications of the right to know. The conclusion reached is that the right to know is generally recognized as one of the basic rights of society in the United States, whether as a First Amendment right or not, and that caution should be taken before the courts become involved in determining what the public does not have a right to know or in placing prior restraint on that right. (MKM)

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The People's Right to Know:

First Amendment Given?

by

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Winner of the 1980 Moeller Student Paper Competition of the Mass Communications and Society Division, Association for Education in Journalism.

In a self-governing society such as ours, where the people desire to be informed, there is a generally recognized right of the people to know what their government is doing. The government at least pays lip-service to this right. However, the right to know is not an absolute. Few contend that the people have a right to know everything and that the government can never conceal information. The opposite extreme, that the public can never have access to information the government decides to keep secret, is also generally rejected.[1] This paper will explore the foundations of the right to know and the limitations placed on it. It will also discuss the role of the press in furthering the people's right to know.

I. GENERAL AND HISTORICAL THOUGHT ON THE RIGHT TO KNOW

Harold Cross wrote The People's Right to Know in 1953 as a report in response to the American Society of Newspaper Editors' request. He begins his preface with the ringing statements, ". . .The people have the right to know. Freedom of information is their just heritage. . . .Freedom of information is the very foundation of all those freedoms that the First Amendment of our Constitution was intended to guarantee."[2] Cross' book is often quoted as one of the first definitive statements about the legal right to know in the United States. The phrase "the public has a right to know" can be traced back at least to 1945 when the general manager of the Associated Press used it to keynote a campaign for uncensored reporting overseas and for improved access to government records.[3] There are earlier historical references to freedom of the press and the idea, arising from this freedom, that knowledge should be unhindered.

Milton, in Areopagitica, argued against licensing the press, saying, "Give me the liberty to know, to utter, and to argue freely according to conscience. . . ."[4] In colonial America, Benjamin Franklin, John Adams

and Thomas Jefferson, among others, were outspoken about the right of the people to know what goes on in their government.[5] James Madison wrote:

> A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy: or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives.[6]

In 1798, Madison drafted the Virginia Resolutions, in response to the Alien and Sedition Acts of 1798. The Acts provoked much discussion of the meaning of the First Amendment and freedom of speech. A recent law journal note, written by David Mitchell Ivester, gives a very thorough analytical consideration of what Ivester calls the "constitutional right to know." Ivester writes that there is some evidence that the First Amendment was intended by its framers to extend to the people a directly enforceable right to know about governmental affairs. But, even if the framers intended no such enforceable right, they expected the guarantee of freedom of speech and press would effectively secure the right of the people to know about their government. Ivester concedes, however, that there is insufficient direct evidence to "proclaim confidently" that the right to know was the specific intent behind the First Amendment.[7]

Louis Henkin, law professor at Columbia University, writes that the phrase "the right to know" would have appealed to the founding fathers, who asserted that sovereignty lay in the people, and that "government governed with the consent of the governed."[8] The Constitution does not express any such right, however. Henkin attributed this lack to the framer's attitude toward government -- that its "watch dog" powers should be minimal, with the people's rights protected from government infringement. The framers neither declared governmental obligations to the people nor declared affirmative rights of the people that the government was obliged to effectuate. Henkin

states that, whereas a "right to know" might have been a principle rationale for freedom of the press, as far as the law was concerned, "the people's right to know was derivative, the obverse of the right of the Press to publish, and co-extensive with it."[9]

Even disregarding the press, any right of the people was not considered violated in certain matters of governmental secrecy; apparently the people agreed that it should not know what it could not be told without damage to the public interest. Henkin writes, "From our national beginnings, the Government of the United States has asserted the right to conceal and therefore, in practical effect, not to let the people know."[10]

So, though some embodiment of the right of the people to know is apparent in the thinking of our founding fathers and the framers of the Constitution, it cannot be said with certainty that the right, often called "fundamental," is contained in the First Amendment. To say that the right of the people to know arises from the freedom of the press, or is even a basis for such freedom, is safer.

II. THE FOUNDATIONS OF THE RIGHT TO KNOW

Ivester discusses what he terms the four "foundations" of the right to know, on which he bases his discussion of the right. The first is that the right is essential to the proper functioning of a self-government, a democracy. The apparent basis for determining the scope of the right would be the people's need for the information sought. A problem here is that need is a matter of degree, depending on how actively the people are to participate in the governing process. It is "a standard without a reference point...."[11] We will return to the question of need several times throughout this discussion.

Alexander Meikeljohn, philosopher and educator, wrote that the degree to which citizens are denied information about a subject they are to decide upon

will directly determine the overall detriment to the public good. "The principle of the freedom of speech springs from the necessities of the program of self-government," he said, the necessities including the need for information.[12]

Ivester's second foundation is that the right to know is implicit in the structure of the self-governing system itself. The people have an "inalienable power to make and unmake governments" which is not given up when the people delegate powers to the government.[13] Thomas Emerson, a Yale law professor, writes:

> ...The public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information; otherwise, ultimate decisionmaking by the people, to whom that function is committed, becomes impossible....[14]

This basis for the right to know is a recurrent one in American legal and political history. It forms the very backbone of our governmental system, at least as it was conceived.

The third foundation is attributed to Wallace Parks, a legal scholar. Parks suggested that the right to know should be recognized as a corollary right to the government's limited power to withhold information, where such a limitation is a given. Parks wrote, "Nothing could be more irrational than to give the people power, and to withhold from them information without which power could be abused."[15] The right as a corollary is textually grounded in the Ninth Amendment reminder that "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[16]

The First Amendment is the primary textual basis for the constitutional right to know, and is Ivester's fourth foundation. The Amendment is most commonly cited by legal scholars and journalists as the basis of the right of the public to know and the privilege of the journalist to inform that same public. If the rights to speak, publish and inform are to be more than just

theoretical ideals, then "certain implied rights must flow" from them, including the right to receive and gather information and, more importantly for the journalist, the right to have access to sources of information in order thereafter to be able to inform.[17]

According to Ivester, the delicate balance of power in our self-government, which is divided between the branches of government and between the government and the people, is threatened by the tremendous growth of the federal government. It is also threatened by the expanding power of the executive branch and relative diminution of the power of Congress, though this disparity, which reached its height in the Nixon years, seems to be decreasing. Even so, the executive branch is in the position to gather information, and even generates most of the information itself.[18] It would presumably be easy for the government to withhold information, not only from the public, but from itself, from each supposedly limiting branch. Unfortunately, Ivester does not explore this interesting and certainly unnerving possibility, except to declare that the executive branch has the power to produce "serious imbalances in the American constitutional system."[19] We will consider the powers of government later on in this paper.

III. LIMITATIONS ON THE RIGHT TO KNOW AND THE ROLE OF THE PRESS

In a recently decided Supreme Court case, Houchins v. KQED, Inc., Chief Justice Burger, for a plurality, wrote:

> Beyond question, the role of the media is important; acting as the "eyes and ears" of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic, but like all other components of our society media representatives are subject to limits.[20]

It is generally assumed that, just as there are limits on the government, there are limits on the public and the press in obtaining information from the government. Houchins is the most recent Supreme Court case in a line

of cases where usually slim majorities, and in this case a four-justice plurality, have held that there are limits on the right to know, specifically, limits on access to information.

In Houchins, a California broadcasting company, KQED, was refused access to a section of the Alameda County Jail where an inmate had recently committed suicide. KQED sued Houchins, the sheriff of the jail, saying that he had violated the company's First Amendment rights and was preventing the public from being informed about the conditions in the jail and hearing prisoners' grievances. The California District Court told Houchins that he could not prevent KQED from entering the jail and interviewing and filming the prisoners. The Court of Appeals affirmed. The Supreme Court reversed the orders of the lower courts in a 4 to 3 decision, two justices abstaining.

Burger stated that the issue in the case was not the right to receive ideas and information, but was instead the more limited question of whether a claimed special privilege of access by journalists is a right essential to freedom of communication.[21] The Court, following precedent set in Pell v. Procunier[22] and Saxbe v. Washington Post Co.,[23] said "...until the political branches decree otherwise, as they are free to do, the media has no right, special of access to the Alameda County Jail different from or greater than that accorded the public generally."[24] Pell and Saxbe both concerned regulations preventing media access to prisons. Their holdings, echoed by Houchins, were that the media have "no constitutional right of access to prisons or their inmates beyond that afforded the general public," and on that premise, the regulations concerned were upheld.[25]

The Court referred to Grosjean v. American Press Co.[26] and Mills v. Alabama,[27] cases cited by KQED as supportive of its position. The Court distinguished these cases, stating that they emphasized the importance of

informed public opinion and the traditional role of a free press as a source of public information. However, the Court pointed out that neither case intimated that the Constitution compels the government to provide the media with access to information on demand; they were concerned only with the freedom to communicate information once it has been obtained.[28]

Citing quotes from Branzburg v. Hayes, which concerned compelling reporters to reveal their sources of information, the Court said that "news gathering is not without its First Amendment protections."[29] This does not imply, however, that there is a constitutional right of access to news sources. Nor does the undoubted right to gather news "from any source by means within the law"[30] support a claim that the First Amendment compels others to supply information.[31] There are legal limits on the media's right of access to information, even though a restrained right to gather news seems to be recognized. The Court also quoted Zemel v. Rusk, a case upholding a State Department ban on travel to Cuba, as supportive of its position: "...The right to speak and publish does not carry with it the unrestrained right to gather information."[32]

Burger expressed concern about the assumption that the media are the best qualified for discovering governmental corruption. The media, he said, can publish or not, as they wish; there is no pressure by the public on them as there is pressure on the government officers to publish what they might prefer to conceal.[33] Further, the media have no more right of access than the public, he said. Cathy Chessin, in a law journal note, criticizes this view. She states that there is an "inextricable link" between the public's right to know and the role of the press which requires the press to exercise rights that it would be impractical to extend to the general public. Therefore, the Court should not limit its analysis of the media's claim to a comparison

with the access of the general public. Chessin writes, "Certainly, the government must impose some limitations upon press access to maintain internal discipline and security, but the administrative impossibility of admitting the public into certain prison facilities is not sufficient cause to exclude the news media."[34] Stewart, in his concurrence with the plurality, agreed that there should be some flexibility to the concept of "equal access" of the public and the press.

Chessin felt that the decision in Houchins "drastically curtailed" the public's right to know. The Harvard Law Review disagrees, inferring from Burger's opinion an implication that there exists a First Amendment right of public access. It notes that the Chief Justice "went to considerable lengths" to list the alternative means of access to information about prisons that are available to the public. Such listing, it states, "would have been irrelevant if there were indeed no right of access...."[35] The Law Review concludes that Houchins only tested the ruling that the press enjoys no First Amendment right of access beyond that accorded the public, "a proposition seemingly settled by previous cases."[36]

In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court declares, concerning the public's right to know, that "the people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them...."[37] Though this case concerned freedom of commercial speech, the principle of the public's right to know remains the same.

Ivester insists that the only way to preserve the free flow of information essential to a self-governing society is to make certain that the right to know encompasses not only a right to receive, which has been recognized by the courts, but also a right to actively acquire government information. He sees the recognition of the right to receive as a "significant step toward a comprehensive right to know."[38] Such a comprehensive right would presumably

be grounded in the First Amendment. Justice Stewart does not see such a right springing directly from the Constitution. He said:

> There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. ...The public's interest in knowing about its government is protected by the guarantee of a free press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.
>
> The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.[39]

Henkin refers to this "contest" between the government and the press, but with a view different from that of Stewart. The Supreme Court apparently interprets the Constitution, he says, as allowing concealment of information by the government, but also allowing the press the freedom to try and uncover the concealed information, and the freedom to publish it if successful. Henkin regards such interpretation with disdain. He writes:

> That kind of trial by battle and cleverness between the three estates and the fourth hardly seems the best way to further the various aims of a democratic society. It does not ensure that what should be concealed will not be uncovered. And, on the other hand, the rare, haphazard, fortuitous, journalistic uncovering will hardly achieve effective public knowledge of all that should be known, for almost all that is concealed (needfully or not) will continue to be effectively withheld....[40]

Henkin's point is a legitimate one, though the view of the relationship between the press and government as "antagonistic" is prevalent and shows no sign of diminishing. If anything, the press enjoys a good fight, especially if it "wins." Henkin's concern seems to lie with those instances where the press loses. Government has a monopoly on much important information and, by withholding that information, it could curtail freedom of the press to report. Also, by selective handout of information, as in "leaks," the government could distort the function of the press.[41]

Another more recent limitation was imposed on the press and the right

to know in Gannett v. DePasquale,[42] decided in the Supreme Court's last term. The decision in Gannett, which concerned closing pretrial hearings to the press and the public, caused uproar among journalists, who saw their, and consequently the people's, access to information in grave danger.

Stewart, writing for a plurality, went further than allowing courts to close pre-trial hearings when he said, "...(W)e hold that members of the public have no right under the Sixth and Fourteenth amendments to attend criminal trials."[43] Stewart did not make any definitive statement as to the First Amendment, except, in response to Gannett's arguments for a First Amendment guaranteed right of access, to say that "such putative right was given appropriate deference" in the lower court.[44] Stewart cited Pell, Saxbe and Houchins as denying the press access to prisons superior to that afforded the general public. The trial court, said Stewart, found that the press did have some constitutional right of access but held that, under the circumstances, the press' right was outweighed by the defendant's right to a fair trial. "In short, the closure decision was based 'on an assessment of the competing societal interests involved ... rather than on any determination that First Amendment freedoms were not implicated.'"[45] Stewart found in the Constitution no right of access to a criminal trial on the public's (and therefore the press') part; the constitutional guarantee is "personal to the accused."[46]

The press has reacted strongly to this decision. One example of such reaction is a recent advertisement placed by the Gannett newspapers. The ad describes a reporter's experience with a court which was closed to the public during a trial. The reporter read a statement of protest, printed on "The Gannett Card" handily in his pocket. The Card contains a prepared plea and a "reminder of the people's First Amendment rights to a free and unfettered press." The ad declares that Gannett reporters have "kept courtroom doors open" in 11 out of 15 cases since Gannett was decided. In the same time period, however, the ad describes

the "frightening" national tally -- only 42 "successes" in 107 cases. The ad continues in ringing tones:

> At Gannett we believe that today, more than ever, journalists must be prepared to move quickly and effectively to defend the public's right to know -- the cornerstone of our rights as a free people in a free society.
>
> At Gannett, we have a commitment to every business we are in ....
>
> And so from Chicago to Shreveport, from Nashville to Niagara Falls, every Gannett newspaper, every television and radio station is free to express its own opinions. Each is free to serve the best interests of its own community in its own way."[47]

Gannett seems to be running an ad campaign with the message "Stewart be damned," and the battle is on between the press and, this time, the courts.

The Gannett decision, with its four dissents and concurring opinions, is by no means the last word on closing trials to the press and the public. The court will decide a related case during the current term which may very well change the direction that the right of access to trials seems to be taking. Though Gannett struck a blow at press freedom and the people's right to know, the blow may be only glancing. That remains to be seen.

Thomas I. Emerson argues that courtroom controls such as closing judicial proceedings in order to eliminate prejudice against the defendant is "the solution demanded by the First Amendment," since expression itself cannot be curtailed. Arguments against such controls which prevent access by the press and the public to information declare that these controls infringe on First Amendment rights. Emerson disagrees, saying, "...the temporary withholding of information that might prejudice the fairness of a judicial proceeding cannot be considered invasion of any constitutional right of access to information."[48] What final decisions on the use of such judicial devices as trial closure come down to is balancing of interests -- the public's versus the defendant's interests. In other cases, other interests are involved. We will explore such balancing in the next section of this paper.

Whether the right issues directly or indirectly, the right to know and

the parallel right of access certainly flow from the First Amendment. The media see their professional interest in the right to information as guarding the rights of the public. It is the public interest in receiving information that is paramount, not any special privilege of the media, though media privilege should be granted to further the public's interest. The function of the media, as they see it, is to provide access to information; any governmental incursion into the media's ability to gather and disseminate information is necessarily an incursion into the public's right to receive it.[49] This brings us to the question of conflict of interests, which we have already touched on. When there is conflict, how do the courts resolve it?

IV. BALANCING: PUBLIC INTEREST AND GOVERNMENT LEGISLATION

The courts speak in terms of "legal limitations" and "legal resolutions" in reference to the right to know. Such legislation as the federal Freedom of Information Act,[50] the Privacy Act,[51] and the various "sunshine" laws,[52] both state and federal, can be viewed either as providing greater access to government information (as the government often sees it) or as putting limitations on the public's right to know (as the media often see it). These laws seek to protect the interests of the government, the interests of the individual or the interests of the public, as the case may be. The Freedom of Information Act has opened many doors that were previously closed to the press, and the press is grateful for this. However, the act is seen as a compromise, and that only. Neither the press nor the government want to give up more than it already has. Thomas Emerson suggests that the nation's experience with Watergate has spurred the development of such legislation, which embodies the concept of government information as public information.[53]

Emerson asserts that the public has a constitutional right to obtain information from the government "necessary ... for the citizen to perform his function as ultimate sovereign." He admits that some exceptions to this right

exist. In theory, the exceptions should be limited to those that are "absolutely essential" to effective government operation. Many, for example diplomatic or collective bargaining negotiations, would exist only temporarily. Emerson lists as other exceptions such things as sensitive national security data, criminal investigations, executive privilege, and privacy of the individual. He cites the federal Freedom of Information Act as adopting much of this basic pattern. Similar state legislation and the "sunshine" laws show what he sees as progress toward recognition of a right to obtain government information.[54] The exceptions listed in the various laws effectively limit such a right, however.

Cross curiously combines the governmental and public interests when he says the public must have a legal right to information, "subject only to those limits imposed by urgent public necessity."[55] It would seem as though the limits would be imposed by governmental necessity, but if the public is the government, then this makes sense. However, there is still the question of how the courts resolve the conflicting "necessities."

When First Amendment rights conflict with valid government interests, often in the form of a regulation, the courts apply a functional interpretation to the law in question. Courts will consider the language of a provision together with the values of the present society, rather than looking at the specific intentions of those who formulated the law.[56] Besides such a functional approach, when rights conflict, the courts will balance the competing interests. A government interest that incidentally infringes on a First Amendment right will be upheld "if the incidental restriction ... is no greater than is essential to the furtherance of that interest."[57]

Chessin, referring to Houchins, writes that society has an interest in "supervising public institutions that are supported by public officials and in which members of the public are confined (here, prisons)." A balancing test, along with a determination of the least restrictive means available to achieve valid governmental interests without undue intrusion on the public's rights, is essential

to protect the interests of both the government and the public.[58] The Branzburg court used this test in determining whether the forced disclosure of sources by reporters was constitutional.[59]

On the other side of the legal sanction to compel the government to give certain information is the ability of the government to withhold information. Just as the Freedom of Information Act forces disclosure, it also allows non-disclosure. The government must have some criteria for withholding information so that the courts can determine whether information is properly withheld. Further, the court must apply some standard of its own to determine the constitutional adequacy of the established criteria.[60] Public policy seems to be the standard criteria: If secrecy is necessary for the safety and welfare of the public, for example in foreign affairs, then it would be sanctioned.

The general power of the government to withhold information is expressly authorized nowhere in the Constitution. The only time secrecy is mentioned is in Art. I, Sec. 5, cl. 3, concerning the right of Congress to delete certain information from its public journals.[61] However, some secrecy is a given. In many working relationships, some confidentiality and privilege are essential and, according to Henkin, many believe that if all official communications were made publicly available, government would be impossible. Further, Henkin suggests that even government officials have a right of "privacy" in their positions, at least as far as a right to have their roles "fully and accurately, not selectively or erroneously, known."[62]

However, viewed in relation to the power of the government to withhold information, the right to know becomes important as the only major constitutional limit of the power to withhold. On the basis of the four foundations discussed earlier, the right to know includes what the people need to know in order to govern themselves. Besides that, the people have a right to know all government information whose non-disclosure serves no public interest.[63] Need is directly related to the degree to

which the people are going to govern themselves. Obviously, the public does not need to know everything that goes on in government; if they did, there would be no need for government. The crucial question in balancing the public's interest against the need to withhold information is how much state interest is needed to offset the public's interest? Ivester addresses this question.

> ...National security and disclosure of information are not totally irreconcilable interests. Ultimately, the security of the nation lies in the proper function of the system of self-government ....
>
> (T)o adopt a formula of convenience...or anything less than necessity is to sacrifice too cheaply the people's right to know and to sell short the ideal of self-government. The right to know should not be limited unless essential to the furtherance of a substantial or compelling state interest.[64]

Recognition that the power of the government to withhold information also calls for recognition of the potential for harm to the people. Because much of the information needed by the public to make evaluations of public activity is in the hands of the government, it would be possible for the government to manipulate public opinion, if it so chose. The government would become less accountable to the people, and accountability is essential to democracy.[65]

Henkin agrees that the "right of the people to know" what their government is doing has always been reduced by the "right" or "duty" of the government to withhold in the public interest. However, governmental secrecy is viewed as at best a necessary evil whose necessity is not agreed upon or even accepted by all. The standards for determining the need of the government to withhold (as opposed to the need of the people to know) also differ widely.[66]

Henkin is concerned that balancing by the courts will not solve the problems of competing interests. The problem is not with judicial balancing in principle, which "is what the Constitution orders even as regards the 'preferred freedoms' of the first amendment." But how, Henkin asks, can the courts meaningfully weigh the needs of the government to conceal, of the press to publish, of the people to know? Inevitably, the courts will have to legislate broad categories,

such as "diplomatic correspondence" or "internal memoranda," which Henkin sees as a definite victory for the government.[67] Henkin writes:

> Effectively, then, the issue will remain one between the Executive and the Press. Many will support the claims of government, insisting that the consequences of over-concealment are less grave than those of over-disclosure; that the wisdom and integrity of government must be the ultimate safeguard in this as in other, more important, decisions; that it is 'our government,' more or less responsible to the people. Others, increasingly distrustful of government, will see in the ever-present threat of uncovering, even by a not-responsible, sometimes irresponsible press, some, and the only, defense against governmental abuse.[68]

This description of the "contest" that Stewart spoke of or the "battle,"in Henkin's terms, is an accurate one. The issue is one in which sides are readily taken. When the court balances the competing interests, as it does in each case where the "right to know" comes up, someone is bound to be unhappy with the decision. As Emerson states, the First Amendment demands such balancing, and though some would like to see it otherwise, it is inevitable that a "right of the people to know" will sometimes weigh less than some other "right."

V. RELATED RIGHTS: PRIVACY AND THE RIGHT NOT TO KNOW

Emerson suggests that the right of privacy and the right not to know can be limits on the right to know. The question, with regard to privacy, is whether or not the First Amendment places limits on such legislation as the Privacy Act of 1974. Alternatively, one might ask whether the Act would limit certain indirect First Amendment rights, such as the right to know. Emerson proposes three methods of reconciling the problem.[69]

One is to weigh the public interest in the right to know against the interest of the individual in maintaining his privacy on a case to case basis. Another would be to draw the line between the two constitutional rights in terms of the need of the public to know. A disadvantage of this method is that it acknowledges a right of the government to determine the value of particular speech, violating the principle that the government cannot regulate expression on the basis of content.

The third, which Emerson favors, is to give privacy precedence. This, he says, would protect the autonomy of the individual from invasion by society or the government.[70] Such a view would certainly impose limitations on the right to know.

As to the right not to know, the Supreme Court has consistently recognized the right of the individual to be protected from having communications forced on him against his will. Examples of the right not to know would be cases concerning mailing obscene documents to unwary receivers and door-to-door commercial canvassing. On the whole the right to know and the right not to know can exist together without conflict.[71]

VI. IMPLICATIONS OF THE RIGHT TO KNOW

Walter Gellhorn, professor at the Columbia University Law School, thinks that the First Amendment is overused in "right to know" cases. The principle is too vague and broadly phrased to decide cases; judges must decide cases. In his estimation, "broad slogans" are not the answer, but "social judgments" of what is happening in society are. "...Whether the right to know should take precedence over other rights is not to be determined by dogma .... The proper boundaries of the right to know cannot be fixed by recourse to a single abstract principle (the right to know)."[72] Gellhorn's point is well-taken, but the right continues to be cited with regularity.

Richard A. Schwarzlose, a journalism professor at Northwestern University, takes an interesting view of the right to know from what he sees as implications by the Court in the Virginia State Board of Pharmacy case, where the right was asserted by members of the public rather than the press on the public's behalf. A public right, defined as a right of the people and not of the press alone "could impinge severely on journalists' prerogative of deciding what to publish."[73] Schwarzlose sees the news media as now being as responsible for withholding information as is the government. By invoking "news judgment" and space limitations, the media withholds news.[74] The press itself will inevitably be seen by the public

as limiting its access to information. The press might well consider the consequences of invoking the people's right to know when it really means the press' right of access. Overuse of the right or using it inappropriately could damage its effectiveness as an argument for other First Amendment freedoms.

James Goodale, a lawyer and executive vice president of the New York Times Co., has said that the courts should not recognize the right to know. If they do, then they will begin to perform the press functions of newsgathering and editing, since only the courts can apply the qualifications inherent in the right to know.[75]

The basic problem with the right to know, in Goodale's view, is that it will result in prior restraint by the courts. The right to know is a qualified right, inevitably involving the determination of what the public does not have a right to know. The courts must determine such limitations. "Thus, once a court decides that a qualification applies, and that there is no right to know, it imposes a prior restraint, at least generically."[76] In the end, he says, the right to communicate is affected, since what has been withheld cannot be communicated.

Goodale's analysis of the implications of legal or judicial recognition of the right to know provokes much thought. Inherent in his discussion is the idea that the right is not necessarily a desirable one. The public can obtain information through other means, without resorting to what may be a vague and too broadly stated right. If the right to know is based, as has been suggested, on need, then we must concede that the public does not need to know everything. Nor would the public want to know everything. What purpose, then, does the right serve?

The right to know is generally recognized as one of the basic rights of a free and self-governing society. It is emotionally unpalatable to suggest that the right of the public to know is not necessary, is not desirable, or does not exist. In a society such as ours, where information is highly valued and an informed public is a national goal, the right to know serves a purpose. Challenges,

direct or indirect, to the right to know, far from undermining it, seem to strengthen the value it has for society as a whole. Though there is some question as to the degree to which it is recognized, the existence of the right, whether as a First Amendment right or not, is a given. The courts need not recognize the right of the public to know in so many words.

FOOTNOTES

1. David Mitchell Ivester, 4 Hastings Constitutional Law Quarterly 109, 154, n.217. The author was a third year law student in 1977.

2. Harold L. Cross, The People's Right to Know, xiii-xiv. It is interesting to note that these are usually the only pages quoted from or even cited to in this book.

3. Richard A. Schwarzlose, "For Journalists Only?" Columbia Journalism Review, July/August 1977, Vol. XVI, No. 2, p. 33. Schwarzlose teaches press-government relations at Northwestern University's Medill School of Journalism.

4. John Milton, Areopagitica -- A Speech for the Liberty of Unlicensed Printing, To the Parliament of England (1644).

5. 4 Hastings CLQ 109, 120-121. Ivester quotes a letter from William Cushing, Chief Justice of Massachusetts, to John Adams, written in 1789, two years before the ratification of the First Amendment. Ivester's comment, footnote 61, "Both men perceived the fundamental necessity for public information in a democratic or responsible system and the crucial role of freedom of the press in assuring the availability of such public information. Cushing expressly recognized the distinction between acquiring information and disseminating it. He included the former, with no hint of surprise or disagreement by Adams, within the compass of the state (Mass.) constitutional provision protecting freedom of the press." The letters themselves are too lengthy to be included here.

6. 9 Writings of James Madison 103, (G. Harst ed. 1910), letter from James Madison to W.T. Barry, Aug. 4, 1822.

7. 4 Hastings CLQ 109, 119, 124.

8. Louis Henkin, 120 University of Pennsylvania Law Review 271, 273.

9. id., at 273.

10. id., at 273.

11. 4 Hastings CLQ 109, 151-152.

12. A. Meiklejohn, Free Speech and Its Relation to Self-Government, at 26 (1948) (Harper, N.Y.)
Meiklejohn, who died in 1964, was born in England He is known as a legal philosopher.

13. 4 Hastings CLQ 109, 116-117.

14. Thomas I. Emerson, 1976 Washington University Law Quarterly, 1, 14 (1976). Emerson refers to this as the "Meiklejohn theory." He writes, at 14, "...the greatest contribution that could be made in this whole realm

of law would be explicit recognition by the courts that the constitutional right to know embraces the right of the public to obtain information from the government." He states the Meiklejohn theory as the basis for this position.

15. Wallace Parks, "The Open Government Principle: Applying the Right to Know under the Constitution," 26 George Washington Law Review 1, 7-8 (1957). Parks was consultant to several Congressional subcommittees, some concerning constitutional law and government regulations. His degrees included an L.L.D. and a Ph.D. He died in 1957.

16. 4 Hastings CLQ 109, 118. Ivester was quoting the Ninth Amendment here.

17. id., at 118.

18. id., at 111-112.

19. id., at 112. Ivester's view of the potential for abuse of power by the executive seems a bit alarmist, but this may be a function of the time period he was writing from. There now appears, at least, to be more openness in government. In addition, our most recent president is not an example of the executive wielding disproportionate power over the legislative branch.

20. Houchins v. KQED, Inc., 98 S.Ct. 2588, 2594 (1978).

21. id., at 2596.

22. Pell v. Procunier, 417 U.S. 817, 94 S.Ct 2800 (1974).

23. Saxbe v. Washington Post Co., 417 U.S. 843, 94 S.Ct. 2811 (1974).

24. Houchins v. KQED, 98 S.Ct., at 2597.

25. Pell v. Procunier, 417 U.S. at 834.
Saxbe v. Washington Post Co., 417 U.S., at 850.
A quote from Pell, taken out of context and at face value, appears supportive of a right of access to information, though a look at the holding dispels any such notion. "The constitutional guarantee of a free press 'assures the maintenance of our political system and an open society,'... and secures 'the paramount public interest in a free flow of information to the people concerning public officials.'...Correllatively, the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published...." 417 U.S., at 832, 94 S.Ct., at 2809.

26. Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444 (1936). This case concerned a challenge by a newspaper publisher to a state tax on advertising revenues of newspapers. The Court ruled the tax invalid.

27. Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434 (1966). Mills concerned a challenge to a statute which made it a crime to publish editorials about election issues on election day. The Court declared the statute unconstitutional.

28. Houchins v. KQED, 98 S.Ct., at 2594-2595.

29. Branzburg v. Hayes, 408 U.S. 665, at 707, 92 S.Ct. 2646, 2670 (1972).

30. id., 408 U.S., at 681-682, 92 S.Ct., at 2657.

31. Houchins v. KQED, 98 S.Ct., at 2595.

32. id., at 2595, quoting Zemel v. Rusk, 381 U.S. 1, 16-17, 85 S.Ct. 1271, at 1281 (1965).

33. id., at 2596-2597.

34. Cathy E. Chessin, 53 Tulane Law Review 629, 640 (February 1979). In reference to the role of the press, Chessin writes, "The issue (in Houchins) is not what is the most effective means of informing the public. The Framers of the Constitution specifically designated the press as the agent to fulfill the public's right to know. The Court's assertion that prison access should be limited to the source best suited to inform the public disregards the intended role of the press in society. The first amendment protection of newsgathering is not absolute, but neither is it limited solely to sources that provide the best coverage." id., at 639. See also, Culliver's Periodicals Ltd. v. Chas. Levy Circulating Co., Inc., 455 F. Supp. 1197 (D.C. Ill. 1978) (5th Cir.) "... I n assessing a newsgatherer's claim of privilege and in balancing the competing interests involved, a court should consider: the nature of the case at bar; the relevance and materiality of the information sought to be adduced; whether the information sought goes to the heart of, is crucial to, the claims made by the discovering party and the issues framed by the pleadings; and the availability of the information from other sources. If disclosure is ordered, it should be kept to a minimum and should be made only insofar as it is pertinent and necessary to the case of the discovering party. ' D isclosure in the course of a "fishing expedition", is ruled out in a First Amendment case.' Silkwood v. Kerr-McGee Corp, 563 F.2d. 433, 438 (10th Cir 1977)" id., at 1201-1203.

35. 92 Harvard Law Review 175, 184-185 (November 1978). This assumes, of course, that Supreme Court justices never say anything irrelevant.

36. id., at 185.

37. 96 S.Ct. 1817, 1829 (1976). This was an 8-1 decision concerning the constitutionality of a Virginia law prohibiting pharmacists from advertising the prices of prescription drugs. The law was declared unconstitutional and some commercial speech was thereby safeguarded. (Whether all commercial speech merits constitutional protection remains to be seen.) See also, Thornhill v. Alabama, 310 U.S. 88 (1940). The following quote also concerns the public's right to know: "Freedom of discussion, if it would fulfill its historical function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." id., at 102.

38. 4 Hastings CLQ 109, 136-138. Ivester writes, "Receipt of information,

however, is passive. If the right to know consisted only of a right to receive, the flow of information would be totally dependent upon the willingness of the source to communicate. Because much of the information necessary for informed public evaluation of government activity in the hands of the government, the potential for control and manipulation of public knowledge and opinion is obvious....In order to preserve the free flow of information essential to a democratic system, the right to know must encompass not only a right to receive, but also a right actively to acquire government information." id., at 137-138.

39. Stewart, "Or of the Press," 26 Hastings LJ 631, 636 (1975). The plurality in Houchins quoted this passage of Stewart as supporting its conclusion that neither the public nor the media have a First Amendment right to government information about prisons. It is interesting to note that Stewart concurred in the decision, agreeing that the lower court's preliminary injunction against Houchins was unwarranted, but he felt that KQED was "entitled to injunctive relief of a more limited scope." (Houchins v. KQED, 98 S.Ct., at 2598.)

40. 120 U of Penn LR 271, 278.

41. id., at 277. Henkin's alarm may in part be attributed to the time frame from which he was writing. This article was in reference to the Pentagon Papers case. Henkin's comments reflect concern about the frighteningly increasing powers of the government. This was before Watergate, when the Nixon administration had a fairly powerful hold on things. While such fear as Henkin's of the government need not be so strong today, it does not hurt to keep these considerations in mind, especially since the "battle" appears to continue.

42. 99 S.Ct. 2898, 61 L.Ed.2d. 611 (1979).

43. id., at 628.

44. id., at 629.

45. id., at 629, quoting Saxbe, 417 U.S. 850, 860 (Powell, J., dissenting.)

46. id., at 621. Stewart cites In Re Oliver, 333 U.S. 257, and Estes v. Texas, 381 U.S. 532, as saying both "recognized that the constitutional guaranted of a public trial is for the benefit of the defendant. There is not the slightest suggestion in either case that there is any correllative right in members of the public to insist upon a public trial." id., at 621.

47. Gannett Advertisement, Wall Street Journal, Jan. 17, 1980. Stewart seems to be taking part in quite a constitutional "contest" here, perhaps more than he really intended.

48. Thomas I. Emerson, The System of Freedom of Expression, Vintage Books, New York, N.Y., 1970, p. 463.

49. 60 Georgetown LJ 867, 1084-1985, n. 1251 (1971-72), quoting the Brief for the New York Times as Amicus Curiae, app. at AI-1 to -124, United States v. Caldwell, cert. granted, 402 U.S. 942 (1971) (No. 70-57), rev'd. 408 U.S. 665, 92 S.Ct. 2686 (1972).

50. 5 U.S.C.A. S552a, amended 1974 by Public Law 93-502. The FOI Act provides for nine exemptions: 1)national security matters, 2)internal personnel rules, 3)statutory exemptions, 4)trade secrets, 5)inter-agency and intra-agency memoranda, 6)matters of personal privacy, 7)investigatory files, 8)financial institution records, and 9)geological information concerning wells. (from 4 Hastings CLQ 109, 144, n. 157)

51. 5 U.S.C.A. S552c (1974), Public Law 93-579.

52. The federal act is found under 5 U.S.C.A. S552b, called the Government in the Sunshine Act (effective Mar. 12, 1977). As of 1977, all states had open meeting laws. (See Nelson and Teeter, Law of Mass Communications, at 435, Foundation Press, Mineola, N.Y. (1978), citing Pat Keefe, "State Open Meetings Activity," FOI Center Report #378, Sept. 1977, p. 7.)

53. 1976 Washington U. LQ 1, 15.

54. id., at 16-17.

55. Cross, The People's Right to Know, at xiii.

56. 4 Hastings CLQ 109, at 134-135.

57. 92 Harvard LR 175, 183, quoting U.S. v. O'Brien, 391 U.S. 367, 377, (1968). The case upheld a law against draft card destruction.

58. 53 Tulane LR 629, 638. Chessin criticizes the Houchins decision as not employing the traditional Balancing test and as a result, restricting the public's right to know. "More importantly, restraints on press publication, which have so long and steadfastly been guarded against, can now be accomplished by prohibiting public and press access to information within government control." id., at 640.

59. Curtis MacDougall, a professor of journalism, wrote in response to the Matter of Farber, a case in which a journalist refused to reveal sources of information, "Confidentiality is essential. Newspapers are not the police. They serve the public only by fact gathering. The police can ferret the same information." (Editor & Publisher, Sept. 9, 1978, at 7-11) This seems to be the consensus among the media in general. Cases such as Zurcher v. Stanford Daily, 436 U.S. 547 (1978), Farr v. Superior Court of California, 22 Cal. App. 3d 60 (1971), Matter of Farber, 394 A2d 330 (N.J. 1978), People v. Zagarino, 411 N.Y.S.2d 494 (N.Y. Sup. 1978) are criticized as interfering with the people's right to know, by causing sources to "dry up" as a result of forcing journalists to reveal their identity. Zurcher is slightly different, since it concerns the search of a newspaper office without the paper's permission. Still, it goes to the same point. See also, Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co., 593 F.2d 1030 (C.A.D.C.1978), for another case on "official harassment." Forced disclosure of confidential sources has been called one of the strongest limitations that the courts and the government have been able to impose on the right to know and on freedom of the press. (Unfortunately, I can't remember where I read that.)

60. 4 Hastings CLQ 109, 154.

61. id., at 145. Ivester writes that government officials have asserted the right and power to conceal information from the very first, citing George Washington as an example. In 1790, President Washington apparently submitted an article to the Senate under an injunction of secrecy. That article later formed part of a treaty with the Creek Indian Nation. (n. 164)

62. 120 U of Penn LR 271, 275.

63. id., at 151, 153-154.

64. id., at 155, 156. It would, of course, be up to the courts to determine what this compelling state interest would be, or how compelling it would have to be.

65. id., at 116, n.31, quoting Erwin, Secrecy in a Free Society, 213 The Nation, 454, 456 (1971). The quote: "When the people do not know what their government is doing, those who govern are not accountable for their actions -- and accountability is basic to the democratic system. By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion."

66. 120 U of Penn LR 271, 275.

67. id., at 278-79.

68. id., at 279.

69. 1976 Washington U. LQ 1, 20.

70. id., at 20-21. Edward Bloustein, president of Rutgers, is credited with the second method.

71. id., at 22-23. See, eg., Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (radio broadcast and "captive audience"), Martin v. City of Struthers, 319 U.S. 141 (1943) (canvasser), Cohen v. California, 403 U.S. 15 (1971) ("Fuck the Draft"), and Rowan v. Post Office Dep't., 397 U.S. 728 (1970) (mailing obscenity).

72. 1976 Washington U. LQ 25, 26-27 (1976).

73. Col. Jour. Rev., July/August 1977, p. 33.

74. id., at 34.

75. 1976 Washington U. LQ 29, 32 (1976).

76. 1976 Washington U. LQ 29, 33-34. The right, as qualified, could also be misused. For example, members of the Mafia could assert such a right for purposes that would not be in the public interest at all. Anyone can assert the right.

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